APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 288-64

(Decided February 18, 1966)

DONALD S. CREAMER

v.

THE UNITED STATES

Edward L. Merrigan, attorney of record, for plaintiff.

Robert D. Donlan, with whom was *Assistant Attorney General John W. Douglas*, for defendant.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS and COLLINS, *Judges*.

ON DEFENDANT'S MOTION AND PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

DAVIS, *Judge*, delivered the opinion of the court:

By the Federal Salary Reform Act of 1962 (Part II of the Act of October 11, 1962, Public Law 87-793), 76 Stat. 832, 841, 847, § 701(a)(B), 5 U.S.C. § 1121, Congress changed the traditional criterion for step in-grade raises within the civilian federal service from "a current performance rating of 'Satisfactory' or better" to "work [which] is of an acceptable level of competence as determined by the head of the department." Plaintiff, who was denied an in-grade increase for the period ending June 23, 1963 because it was said that he did not meet this new condition, sues for the advance on the ground that it was illegally withheld. Most of the relevant facts have been stipulated, all are undisputed, and both parties move for summary judgment.

Mr. Creamer, a lawyer, served as a federal employee almost continuously from 1934 until he retired at the end of December 1964. From May 1946, he was an attorney-

adviser, or consultant, with the Veterans Administration's Board of Veterans' Appeal. It was his duty to draft proposed decisions for the Board on the various types of claims for veterans benefits which come before that busy tribunal. In 1962-1963, he held a GS-13 grade; during that year, the Board had almost fifty attorneys (called consultants) in that same grade. Mr. Creamer had, at all relevant times, an annual performance rating of "Satisfactory" or better, issued by the Board under the Performance Rating Act of 1950, 5 U.S.C. §§ 2001, *et seq* (1964 ed.). His period for an in-grade pay increase, if one was to be given, ended on June 23, 1963, and apparently covered the prior year. A determination was made that his work for those months was not "of an acceptable level of competence." The complaint is that, for several reasons, this finding was not legally made or effective, and that plaintiff is therefore entitled to the increase as a matter of law.

1. The first attack is on the validity of the performance evaluation plan used by the Board of Veterans Appeals to judge plaintiff's competence. For some time before June 1963 the Board had utilized, and made known to its consultants, rather elaborate "work measurement and performance standards" which gave numerical grades for the quantity of the employee's "production" and the quality of this "production", as well as for over-all performance. This gauge was one of the prime measuring devices used in appraising plaintiff's work. He says that this was wholly improper because the plan was never submitted to or approved by the Civil Service Commission, as required (in plaintiff's view) by the Performance Rating Act of 1950. That statute directs the various federal agencies to "establish and use one or more performance-rating plans for evaluating the work performance" of their officers and employees (5 U.S.C. § 2002); prohibits the giving of "a performance rating, regardless of the name given to such rating" or the using of any such rating "as a basis for any action, except under a performance-rating plan approved

by the Civil Service Commission as conforming with the requirements" of the Act (5 U.S.C. § 2003); and specifies the nature and content of acceptable performance-rating plans (5 U.S.C. §§ 2004-2005).

The worm in plaintiff's position is that these sections of the Performance Rating Act have nothing to do with plans or guidelines which may be used for determining an employee's "acceptable level of competence" under the Federal Salary Reform Act of 1962.[1] The Performance Rating Act applies to regular performance ratings, in the sense those have long been known throughout the Federal Government—the recurrent ratings which can lead to separation, reassignment, or demotion. In that piece of legislation Congress was dealing with that precise subject, and with personnel actions which are tied to such performance ratings, like in-grade raises prior to the 1962 Act. But Congress was not laying down general rules for all managerial evaluations of federal employees for any purpose. Certainly, for one thing, appraisals to determine promotions from one grade to another are not covered; nor is the granting of incentive awards or special honors. In 1962, Congress clearly abandoned, for in-grade raises, any connection with annual performance ratings. The old measure of "a current *performance rating* of 'Satisfactory' or better" (emphasis added) was deliberately dropped, and a new standard substituted which was wholly outside the structure of the Performance Rating Act (and its gradings of "outstanding", "satisfactory", and "unsatisfactory"). With the cutting of the connection to the Performance Rating Act, the definitions and requirements of that statute no longer had an impact on in-grade advances. As utilized in that area, the measurement standards of the

[1] If the Performance Rating Act is inapplicable, there was clearly no requirement that such plan or guidelines be presented to or approved by the Civil Service Commission. Neither the 1962 Act, the Executive Order or the Commission's regulations on in-grade increases under that statute imposed that requirement.

Board of Veterans Appeals did not comprise a "performance-rating plan" within the 1950 Act, but, rather, independent criteria with another aim.

This court has several times rejected claims that one provision or another of the Performance Rating Act controls federal personnel action under an independent statute. *Misuraca* v. *United States,* 135 Ct. Cl. 387, 394 (1956); *De Busk* v. *United States,* 132 Ct. Cl. 790, 796-97 (1955); *cert. denied,* 350 U.S. 988 (1956); *Atkinson* v. *United States,* 144 Ct. Cl. 585, 596-98 (1959); *Chisholm* v. *United States,* 149 Ct. Cl. 8, 11-13 (1960); *Allen* v. *United States,* 155 Ct. Cl. 598, 600 (1961); *Begendorf* v. *United States,* 169 Ct. Cl. 293, 297, 340 F. 2d 362, 365 (1965). The present case is another instance in which that Act, if confined to its proper scope, must be held irrelevant to a transaction and proceeding governed by separate legislation.

2. Plaintiff's second assault on the denial of the increase is that he was deprived of his right under Section 14 of the Veterans' Preference Act, 5 U.S.C. § 863 (1964 ed.), to a 30-day notice. The argument is in three steps (each of which defendant disputes): (a) under the 1962 Act, the Civil Service Commission regulations, and the Veterans Administration's own regulations, plaintiff automatically became entitled to the in-grade raise at the end of the period (June 23, 1963) unless he was properly notified in writing, *before that time,* that he was not to receive the benefit; (b) he did not receive such written notification until June 26, 1963—three days too late; and (c) it follows that, when he was belatedly notified of the denial on June 26th, the agency's action was equivalent to a reduction in his then compensation (which had already jumped on June 23rd), and under Section 14 of the Preference Act he should have been granted at least 30 days advance written notice before the reduction could become effective.

We do not test the sting of the first and third prongs of this argument, because we think that plaintiff obtained

adequate notice prior to June 23rd.[2] There was substantial compliance both with the Commission's general directive on notice,[3] and with the employing agency's regulations specifically demanding notice prior to the end of the in-grade period.[4] According to an unchallenged affidavit of plain-

[2] Plaintiff appears to concede—correctly so—that if he received proper prior notice he has no claim that his salary was illegally *reduced* (i.e., without the 30-day notice required by Section 14 of the Veterans' Preference Act) though he may have been denied pay to which he was entitled on other grounds.

[3] The Commission regulation, 5 C.F.R. § 531.407(b) (1964), directs that whenever the agency determines that the employee's work is not of an acceptable level of competence the employee should receive "A prompt, written notice of that determination."

[4] Veterans Administration Interim Issue 5-169, dated Oct. 18, 1962, provided in pertinent part: "*Notifications to employees.* Specific notification to employees whose work is considered to be of an acceptable level of competence is not required. Employees on whom a determination is made that performance is not of an acceptable level of competence *must* be so notified in writing. Except for those determinations required with respect to an effective date of October 14, 1962, by reason of the provisions of the Federal Salary Reform Act of 1962, the notification shall be given prior to the date on which the time-in-grade requirements for within-grade step increase will be met. This notification shall be signed by the supervisor making the original determination and the higher-level supervisor having responsibility for confirming such unfavorable determinations. The notification shall include:

"*a.* Reasons for the determination, including specific areas in which the employee's performance has been less than competent. (*Note:* Where the determination is based on a pending 90-day warning of unsatisfactory performance or a written notice of intent to demote or remove for cause, reference to such fact will suffice.)

"*b.* The date, within the next 52 calendar weeks, by which a new determination will be made.

"*c.* The employee's right upon written request within 10 days of his receipt of the notification, to seek reconsideration of the determination. Information about how to initiate such reconsideration also should be included.

"*d.* A statement that a copy of the notification will be placed in the employee's official personnel folder." [Emphasis in original.]

tiff's supervisor: (i) Mr. Creamer was informed, at the end of each calendar quarter, of his standing as measured by the Board's performance criteria and was told weekly of the recorded amount of his "production"; (ii) the supervisor personally discussed with plaintiff, in June, August, September, and December 1962, and at other times, the fact that he was not performing up to the standard expected of attorneys of his grade; (iii) in August 1962, a high official of the Board advised plaintiff by written memorandum that his work was below acceptable standards (as well as indicating specific ways in which he was deficient); and (iv) for the quarter ending March 31, 1963, plaintiff was given a written report showing that he was below average in production, quality, and over-all efficiency, and was orally advised that these facts raised a strong presumption that a regular in-grade salary increase was not warranted. We consider this course of conduct during the critical year, especially the written report as of March 31, 1963, to be adequate satisfaction of the Veterans Administration's internal requirement that "the notification shall be given prior to the date on which the time-in-grade requirements for within-grade step increase will be met [*i.e.* June 23, 1963]." See *Borak* v. *Biddle*, 141 F. 2d 278, 281 (C.A.D.C. 1944), *cert. denied*, 323 U.S. 738. All the major objectives of this notice-provision were fulfilled by the agency's communications in 1962 and 1963, written and oral, to plaintiff; he must have known that, unless his work improved markedly, he would not be given a step increase. The delayed notice of June 26th can therefore be disregarded as out of time, and still the agency-regulation's insistence on a pre-June 23rd notification was accomplished.[5]

3. Plaintiff urges, also, that his supervisors acted arbitrarily and capriciously in evaluating his level of com-

[5] The Commission's more general directive of a "prompt written notice" (see fn. 3, *supra*) was satisfied by the formal notice of June 26th, together with the prior communications.

petence. At the time of their determination, there was no review by the Civil Service Commission of such denials.[6] We must therefore pass on the claim of arbitrariness without the benefit of Commission assessment. We start, however, with the premise that the employing agency had considerable leeway in deciding whether an employee had reached and maintained "an acceptable level of competence." This is indicated, first of all, by the words Congress used—"acceptable" necessarily implies discretion and choice; a judgment of "competence" plainly invokes evaluation, appraisal, and assessment; "as determined by the head of the department" shows that no mechanical or automatic standard was being imposed by this statute, as had been the case under the prior law when a performance-rating of "Satisfactory" was all-sufficient. Next, the legislative history suggests that Congress sought, throughout the 1962 Act, to construct a pay system which provided for "executive discretion to meet individual and special needs, to use pay for motivating employees, and to initiate general adjustments as required." See "Statement of Purpose and Justification and Section-by-Section Analysis of the Legislation Requested by the President of the United States to Reform the Major Federal Statutory Salary Systems", Committee on Post Office and Civil Service, House of Representatives, February 28, 1962 [Committee Print], p. 1. See, also, S. Rept. No. 2120, 87th Cong., 2d Sess., p. 24 (1962). The President's Executive Order No. 11073, 28 Fed. Reg. 203, 205 (1963), implementing the new in-grade provision, told the Civil Service Commission "to insure that *only* those employees whose work is of an acceptable level of competence receive step-increases * * *" (emphasis added). The commission's regulation, 5 C.R.F. § 531.407(a), follows this

[6] Congress has since provided for Commission review. Section 3 of the Federal Employees Salary Act of 1965, Public Law 89-301, Act of October 29, 1965, 79 Stat. 1111, 5 U.S.C. 1121(c). See S. Rept. No. 910, 89th Cong., 1st Sess., p. 5 (1965); H. Rept. No. 792, 89th Cong., 1st Sess., pp. 6, 34 (1965).

wording and places the determination in "the head of the department, or a person authorized to act on his behalf." All this adds up to a large grant of discretion to the department head and his delegates. Mishandled discretion can, of course, be set aside (see, *e.g.*, *Gadsden* v. *United States*, 111 Ct. Cl. 487, 490, 78 F. Supp. 126, 127-28 (1948)), but the court should not be quick to find an abuse.

In setting out the deficiencies he sees, plaintiff contends that the agency's discretion was exceeded by the mere use of the numerical "Work Measurement and Performance Standards" issued by the Board of Veterans Appeals. Our view differs. As we have already held, those guidelines did not have to be presented to or approved by the Civil Service Commission. In itself, the use of such measuring devices cannot be called arbitrary; though many professionals decry statistical tallies of work-production and work-quality, there are others (including the Judicial Conference of the United States, in some respects) who hold them appropriate even for adjudicators. A choice either way lies within the realm of responsible opinion. It is also said that the Board's work-measurement standards were defective because they were not conclusive but merely created a "strong presumption" of eligibility or non-eligibility for the in-grade increase, leaving it to the supervisory officials to take account of other factors (many specified in the Board's regulation) as warranted.[7] Again, adoption of this "open-ended" aspect of the work measurement plan was within the agency's jurisdiction under the 1962 Act; it has long been the rule that, where administrative discretion is to be exercised, proper place can be made for relevant individual circumstances; rigid formulas, to be strictly followed, need not be established. *Cf. Securities and Exchange Comm.* v. *Chenery Corp.*, 332 U.S. 194, 201-03 (1947).

[7] More generally, the Veterans Administration's over-all regulation on in-grade increases (Interim Issue 5-169, Oct. 18, 1962) directed the use of performance on work standards, where established, "unless there is other contradictory evidence."

The Civil Service Commission recognizes that specific work standards are not conclusive, although they control "ordinarily." Federal Personnel Manual, Chap. 431, Section 4-9.

Two more-limited charges of capriciousness are advanced. One is that, while plaintiff was denied an in-grade increase in June 1963, he was granted one in July 1964 even though his numerical ratings, according to the Board's guidelines, were lower (at least no better).[8] This showing does not persuade us that the agency was arbitrary. As plaintiff himself points out, and we have just discussed, the numerical scores were not definitive. The record shows, without dispute, that in 1962-1963 plaintiff's supervisors felt strongly both that he intended "to do only enough to get by" (because of his feeling that he had been mistreated by management) and that he could easily come up to the proper standards if he desired. Moreover, his over-all efficiency index for May 1963—not cited by plaintiff, but relevant because it was immediately prior to the end of the in-grade period—was only 59.3 (with a production index of 31.6), far below the Board's standard of acceptability.

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[8] With respect to the denial in June 1963, plaintiff cites the following scores:

	Production	*Quality*	*Overall*
Quarter ending Sept. 30, 1962	79.1	83.8	81.5
Quarter ending Dec. 31, 1962	71.2	91.7	81.5
Quarter ending March 31, 1963	70.0	90.0	80.0
April 1963	116.3	79.5	97.9
10 months (cumulative) to April 30, 1963	76.7	87.2	82.0

Though not cited by plaintiff, the record shows the following for the six-month period from Jan. 1, 1963 through June 30, 1963:

Production	*Quality*	*Overall*
64.0	88.5	76.3

With respect to the approval of an increase in July 1964, plaintiff cites the following:

	Production	*Quality*	*Overall*
3 mos. prior to approval	64.1	87.2	79.5

These factors, which are not indicated to have existed in 1964, are enough to acquit the plaintiff's supervisors of arbitrariness in 1963.

The other specific claim is that plaintiff was deprived of his increase while a few other Board attorney-consultants with similar or lower scores received theirs. Here, too, plaintiff forgets that the agency could properly consider elements other than the numerical indices. The Board's written report on the performance scores of its legal consultants, as well as other documents in the record, show, so far as we can tell, that the supervisors had rational reasons for granting step raises to the others with low statistical ratings.[9] At the least, plaintiff has not demonstrated that the distinctions the Board drew were irrational or baseless.

4. The plaintiff's final challenge, to the constitutionality of the in-grade step increase section of the 1962 Act, must likewise be rejected. In the light of the Act's legislative history, the prior experience of the agencies of the Federal Government in evaluating their personnel, and the latitude given to the Federal Government as employer, we must hold that "an acceptable level of competence" is a valid, not unduly general, standard to apply in deciding who should have in-grade raises. *Cf. Fahey* v. *Mallonee*, 332 U.S. 245, 249-53 (1947); *Lichter* v. *United States*, 334 U.S. 742, 784-86 (1948); *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 896-97 (1961). Plaintiff also contends that he was deprived of property without due process because the Board of Veterans Appeals acted improperly and arbitrarily toward him. Since we have held that this was not so, the constitutional claim falls, too.

Plaintiff's motion for summary judgment is denied and defendant's motion is granted. Plaintiff is not entitled to recover and his petition is dismissed.

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[9] Such as the subjective impressions of the supervisors, inexperience of the employee, marked progress by an employee, very good ratings prior to the particular evaluation period, unusual assignments, complexity of work.

APPENDIX B

I. The Performance Ratings Act, enacted by Congress in 1950, provides at 5 U.S.C. § 2003:

> "*Other rating procedures prohibited*—No officer or employee of any department shall be given a performance rating, *regardless of the name given to such rating,* and no such rating shall be used as a basis for any action, except under a performance-rating plan approved by the Civil Service Commission as conforming with the requirements of this chapter." (Italics supplied)

The said Performance Ratings Act of 1950 also provides at 5 U.S.C. 2004:

> "*Requirements for performance-rating-plans* — Performance-rating plans required by this chapter shall be as simple as possible, and each such plan shall provide—
>
> (1) that proper performance requirements be made known to all officers and employees;
>
> (2) that performance be fairly appraised in relation to such requirements; . . .
>
> (5) that each officer and employee be kept currently advised of his performance and promptly notified of his performance rating."

The said Performance Ratings Act further provides, at 5 U.S.C. 2005, in pertinent part:

> "*Ratings for Performance; warning prior to rating of unsatisfactory* . . . No officer or employee shall be rated unsatisfactory without a ninety-day prior warning and reasonable opportunity to demonstrate satisfactory performance."

Finally, the said Performance Ratings Act of 1950 provides at 5 U.S.C. 2007, as here pertinent:

> *"Regulations; inspection and revocation of approval of plans . . .*
>
> (b) The (Civil Service) Commission shall inspect the administration of performance rating plans by each department to determine compliance with the requirements of this chapter and the regulations issued thereunder.
>
> (c) Whenever the Commission shall determine that a performance rating plan does not meet the requirements of this chapter and the regulations issued thereunder, the Commission may, after notice to the department, giving the reasons, revoke its approval of such plan.
>
> (d) After such revocation, such performance-rating plan and any current ratings thereunder shall become inoperative, and the department shall thereupon use a performance-rating plan prescribed by the Commission."

II. Until October, 1962, classified officers and employees of the United States compensated on a per annum basis were, in accordance with the provisions of 5 U.S.C. 1121 (B), entitled to periodic step increases in pay subject to the condition, *inter alia*,

> "(B) That he has a current performance rating of "Satisfactory" or better . . ."

In 1962, Congress, by Public Law 87-793, amended 5 U.S.C. 1121 (B) to make it read as follows:

> "(B) That his work is of an acceptable level of competence as determined by the head of the department . . ."

In 1965, *prior to the decision of the Court of Claims herein,* Congress further amended 5 U.S.C. 1121 by adding thereto a new subsection (c), which reads as follows (Public Law 89-301):

> "(c) Whenever a determination is made under subsection (a) of this section that the work of an officer or employee is not of an acceptable level of competence, he shall be given prompt written notice of that determination and an opportunity for reconsideration of the determination within his department under uniform procedures established *by the Commission.* If the determination is affirmed upon reconsideration, the employee shall have *a right of appeal to the Commission.* If the reconsideration on appeal results in a reversal of the earlier determination, the new determination shall supersede the earlier determination and shall be deemed to have been made as of the date of the earlier determination . . ." (Italics supplied)

Regarding the procedure to be followed in cases where employees are to be denied step increases in pay because of an alleged *unacceptable level of competence,* the Veterans' Administration's own Regulations state (VA Manual MP-5, Chap. 2, Interim Issue 5-169):

> *"Notifications to employees*— . . . Employees on whom a determination is made that performance is not of an acceptable level of competence *must* be so notified in writing. Except for those determinations required with respect to an effective date of October 14, 1962, by reason of the provisions of the Federal Salary Reform Act of 1962, *the notification shall be given prior to the date on which the time-in-grade requirements for within-grade step increase will be met.* This notification shall be signed by the supervisor making the original determination and the

higher-level supervisor having responsibility for confirming such unfavorable determinations. The notification shall include:

(a) Reasons for the determination, including specific areas in which the employee's performance has been less than competent. NOTE:—Where the determination is based on a pending 90-day warning of unsatisfactory performance or a written notice of intent to demote or remove for cause, reference to such fact will suffice.)

(b) The date, within the next 52 calendar weeks, by which a new determination will be made.

(c) The employee's right upon written request within 10 days of his receipt of the notification, to seek reconsideration of the determination. Information about how to initiate such reconsideration also should be included.

(d) A statement that a copy of the notification will be placed in the employee's official personnel folder." (Italics supplied)

III. The Veterans' Preference Act of 1944 (58 Stat. 390, 5 U.S.C. § 863) provides, in pertinent part:

"No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, . . . or department . . . shall be discharged, suspended for more than thirty days, furloughed without pay, *reduced* in rank *or compensation* . . . except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose . . . reduction in rank or compensation is sought shall have at least thirty days' advance written notice . . . . stating any and all reasons, specifically and in detail, for any such pro-

posed action; *and such preference eligible shall . . . have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting,* such appeal to be made in writing within a reasonable time after the date of receipt of notice of such adverse decision: *Provided,* That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, *in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission;* after investigation and consideration of the evidence submitted, *the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer . . . and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends . . .*" (Italics supplied)